

DUTIES OF DIRECTORS OF CAYMAN ISLANDS COMPANIES

This Memorandum provides only a brief and general overview of the relevant law. It is not intended to be comprehensive and is not a substitute for professional advice in the context of a particular set of circumstances.

Framework

The duties of directors under Cayman Islands law are governed by the Companies Law (Revised), the common law and the memorandum and articles of association of the company. Directors' duties are not codified in the Companies Law (Revised) and therefore particular regard must be had to the common law. Cayman Islands courts will generally have regard to relevant decisions of the English courts and therefore, in large part, common law rules applicable in England with regard to directors' duties would normally apply in the Cayman Islands.

Common Law

Directors are subject to a number of fiduciary duties which may be summarised as follows:-

1. to act in good faith and in the best interests of the company;
2. not to exercise powers for an improper purpose;
3. not to misapply the assets of the company;
4. to avoid a conflict of interest; and
5. not to make a secret profit from his or her position.

Each of these duties derive from the fact that under the law a director is regarded as a fiduciary with obligations similar to those of a trustee. These duties are owed to the company. Generally, the company will be represented by the interests of its shareholders. However, where the company is insolvent, or of doubtful solvency, at the relevant time due regard must be given by the directors, when exercising their duties, to the interests of creditors of the company. Where financial loss arises as a result of a breach of any of the above duties a director may be held personally liable to the company for such loss.

In addition to fiduciary duties, directors are subject to a duty of care and skill. This duty has, through a succession of judicial authorities in a number of English common law jurisdictions, been tightened over recent years. Generally, regard will now be had both to the knowledge, skill and experience that could reasonably be expected of the role that a

particular director fulfils and to the actual knowledge, skill and experience that the particular director in question possesses ie the test is both objective and subjective. This development in the law is a reflection of the commercial reality that it no longer suffices for a director to be simply a well-meaning amateur but, in most instances, it will be expected that he or she will be competent and experienced and will adopt a highly responsible and professional approach to the role.

A director may also be held personally liable where he or she has been fraudulent or has acted outside his or her authority.

Directors Meetings

There is no specific requirement under the law as to the frequency with which board meetings must be held. Instead, the law requires that board meetings are held sufficiently frequently to enable the directors to fulfill their obligations to the company.

Subject to the company's articles of association, board meetings can be held over the telephone or by video conference or can be replaced by written resolutions signed by all directors. However, it is always important to obtain onshore legal advice to ensure that the method by which meetings are held or resolutions passed or the physical location of directors during a meeting, does not give rise to tax or regulatory problems.

Statutory Duties (all companies)

Directors of Cayman Islands companies are subject to a number of statutory duties under the Companies Law (Revised) including the following:-

1. Directors are required to keep proper minutes of all directors' meetings and these should be held on the company's minute book.
2. The directors are responsible for ensuring that the Company's register of members, register of directors and officers and register of mortgages and charges are kept up to date. The latter two registers must be kept at the registered office of the company in the Cayman Islands whereas, in the case of an exempted company (ie a company carrying on business outside the Cayman Islands – the Cayman Islands equivalent of an international business company), the register of members can be kept anywhere.
3. The directors must ensure that the company keeps proper books of accounts which reflect a true and fair view of the state of the company's affairs and explain its transactions. Please note that under Cayman Islands law, apart from regulated entities (e.g. banks, trust companies, insurance companies and the like) there is no requirement for an annual audit.
4. A Cayman Islands company is subject to a number of filing requirements with the Cayman Islands Companies Registry and it is the responsibility of the directors to

ensure that these filings are made. Examples include: a change to the company's name, change of registered office, change in directors or officers, any amendments to the company's memorandum of association or articles of association and the passing of any special resolution by the shareholders. Changes in directors or officers must be filed within 30 days of the change taking place and failure to do so will lead to an automatic daily default fine of CI\$10 (US\$12.20). Because of the importance of ensuring that all filings are made on a timely basis, it is essential that all minutes and resolutions, whether at board level or shareholder level, are immediately provided by fax or email (with hard copy to follow) to the registered office or the company's Cayman Islands legal counsel who will then attend to the necessary filings on behalf of the directors.

5. An exempted company has a specific obligation to file an annual return with the Cayman Islands Companies Registry (together with an annual filing fee) confirming that since the previous return or since registration, there has been no alteration in the memorandum of association (other than any alterations already reported), the company's operations have been carried on mainly outside the Cayman Islands and the company has not traded in the Cayman Islands with anyone except to further the company's business carried on outside the Cayman Islands.

Statutory Duties (segregated portfolio companies)

Directors of segregated portfolio companies are subject to certain additional statutory duties as follows:-

1. Directors must have procedures in place to segregate, and keep separate and identifiable, cell assets from core assets and to segregate, and keep separate and identifiable, the assets of one cell from the assets of another cell. Therefore, it is important that the core and each cell has its own bank account, securities account, custody account etc. Physical segregation rather than accounting segregation is essential. Any co-mingling of assets across the cells and/or the core is likely to be a fatal blow to the integrity of the structure.
2. Directors must also have procedures in place to ensure that assets and liabilities are not transferred between cells otherwise than at full value.
3. Where any contract, deed or other document is being entered into by the segregated portfolio company in respect of a particular cell, the document must be signed by or on behalf of the directors and the directors must ensure that the document clearly identifies the relevant cell and that the execution of the document is in the name of, or by, or for the account of that cell. Any director who is in breach of this duty incurs personal liability under the document unless relieved of liability by the court. The court will only relieve the director of liability if satisfied that the director ought fairly to be relieved either because he was not aware of the circumstances giving rise to his

liability (and, in being not so aware was not fraudulent, reckless or negligent and did not act in bad faith) or because he expressly objected and tried to prevent the circumstances giving rise to his liability.

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